Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

EMERY TELCOM
PETITION FOR LIMITED WAIVER OF
47 C.F.R. § 51.917(c)(ii)

Emery Telcom (Emery), by its attorney, hereby requests a waiver of Section 51.917(c)(ii) of the Commission's rules,[1] which determines the calculation of 2011 Rate-of-Return Carrier Base Period Revenue by limiting the Transitional Intrastate Access Service component of that calculation to intrastate access revenues received by March 31, 2012. A waiver is sought to permit Emery to include within its Base Period Revenues amounts received after March 31, 2012 for Transitional Intrastate Access Service provided in Fiscal Year 2011 (FY2011). Emery also seeks waiver of the Commission's *USF/ICC Order* at footnote 1745, as necessary, which allows

[1] 47 CFR 51.917(c)(ii).

carriers to seek a waiver of the March 31, 2012 cut-off date if revenues are recovered after that date as a result of "the decision of a court or regulatory agency of competent jurisdiction."[2] As shown herein, due to a unique circumstance, the limitation in Section 51.917(c)(ii) results in a Base Period Revenue amount that does not accurately reflect Emery's (FY2011) revenues or revenue requirement. Moreover, this limitation permanently impacts the eligible recovery calculation limiting Emery's ability to maintain the facilities required to provide access and local service to its customers through access recovery charge (ARC) or Connect America Fund (CAF) recovery into the future.

Factual Background

Emery Telcom utilizes the software of a third party vendor to process carrier access billings (CABS). In October 2011, while reviewing calls that the billing system did not rate, it was discovered that a large percentage of calls associated with three direct trunks were not rated. Further examination of these records indicated that calls over the direct trunks that did not contain carrier identification information (CICs or OCNs) were not rated by the billing system and were treated as unbillable calls due to a billing system configuration error. Emery immediately took steps to correct the billing system and began to quantify the historical extent of the billing error. Starting November 1, 2011 (for all traffic in October 2011), Emery began billing all interstate and intrastate traffic on direct trunks, including calls that do not contain

[2] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund;* Report and Order and Further Notice of Proposed Rulemaking, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011, at 318, n. 1745 (*USF/ICC Order.)*

carrier identification information, to the owner of the direct trunk rather than based on the call detail record-carrier identification information. The carriers affected by this billing change have not disputed the recurring billings and have paid the monthly bills promptly. In addition to correcting the billings on a go-forward basis, Emery identified and quantified the under-billed intrastate and interstate direct trunk minutes for the two year period ending September 30, 2011. On December 28, 2011, Emery sent invoices to the affected interexchange carriers. The payment due date on the invoices was January 20, 2012.

On January 20, 2012, one of the interexchange carriers paid the December 28, 2011 invoice, which included back-billed FY2011 intrastate access traffic, in full. The other interexchange carriers, however, after a long process of reviewing the invoices and delays caused by their internal administrative processes, did not pay the invoices in full until after the March 31, 2012 deadline. Because these interexchange carriers failed to pay the invoices before March 31, 2012, more than 50% of FY2011 intrastate access revenue was not included in Emery's calculation of 2011 Rate-of-Return Carrier Base Period Revenue. Emery seeks a waiver of Section 51.917(c)(ii) of the Commission's rules to include these revenues in the FY2011 revenues from Transitional Intrastate Access Service as used to calculate the Base Period Revenue for Emery. Emery also seeks waiver, as necessary, of the Commission's *USF/ICC Order*, which allows carriers to seek a waiver of the March 31, 2012 cut-off date if revenues are recovered after that date as a result of "the decision of a court or regulatory agency of competent jurisdiction."

Good Cause Exists to Grant this Waiver

Section 1.3 of the Commission's rules provides that a rule may be waived if good cause is shown.[3] It is well established that waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[4] Further, it is well established that waiver is appropriate “where particular facts would make strict compliance inconsistent with the public interest.”[5] As shown herein, Emery meets these requirements and, therefore, a waiver of the Commission's rule is appropriate and should be granted.

In the *USF/ICC Order*, the Commission dictates that compensation provided to incumbent local exchange carriers (LECs) through intercarrier compensation (interstate and intrastate access charges and reciprocal compensation) for terminating services will be replaced by bill and keep. However, the Commission provides for a gradual transition to bill and keep by allowing LECs "to recover ICC revenues reduced as part of our intercarrier compensation reforms, up to a defined baseline, from alternative revenue sources: incremental, and limited increases in end user rates and, where appropriate, universal service support through the Connect America Fund."[6] The *USF/ICC Order* and Section 51.917 of the Rules provide that the baseline revenue, or 2011 Rate-of-Return Carrier Base Period Revenue is the sum of the carrier's:

> (i) 2011 Interstate Switched Access Revenue Requirement;
> (ii) Fiscal Year 2011 revenues from Transitional Intrastate Access Service received by March 31, 2012; and
> (iii) Fiscal Year 2011 reciprocal compensation revenues received by March 31, 2012, less Fiscal Year 2011 reciprocal compensation payments paid and/or payable by March 31, 2012.

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[3] 47 C.F.R. §1.3.
[4] *WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969).
[5] *Northeast Cellular Tel. Co., L.P. v. F.C.C.*, 897 F2d. 1164, at 1166 (D.C. Cir. 1990).
[6] *USF/ICC Order* at ¶847.

The Commission allows carriers to request a waiver of the rule defining the Baseline "to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction."[7]

Because of the one-time situation described above, where a significant portion of intrastate access service revenues billed for FY2011 were not received until after March 31, 2012, the Base Period Revenue calculated for Emery pursuant to the Commission's rule is significantly and unrealistically low. As demonstrated, Emery's third party billing system did not originally identify the originating source of a significant amount of access minutes for proper billing which did not have carrier identifying information transmitted with the call. However, once the problem was identified, Emery promptly submitted invoices to the appropriate interexchange carriers, well in advance of the March 31, 2012 deadline. One of the interexchange carriers paid the full invoiced amount before March 31, 2012. The other interexchange carriers failed to pay the invoices by March 31, 2012, due to their internal review and administrative processes. However, all charges ultimately were paid. Accordingly, the delay in payment until after the March 31, 2012 deadline was beyond the control of Emery.

Moreover, this issue represents a unique, one-time event. As shown, the traffic identification issue that prevented Emery from billing a significant percentage of its FY2011 intrastate access revenues until December 28, 2011, has been resolved such that Emery has not faced large amounts of unbillable traffic since that time. In addition, not only has Emery been able to send invoices for the intrastate access minutes, but also the interexchange carriers have

[7] *USF/ICC Order* at n.1745.

been paying those invoices. Accordingly, this is not a typical uncollectible situation and it is not likely that Emery will have a significant percentage of uncollected revenues in the future. Thus, Emery's FY2011 Base Period Revenue is not an accurate reflection of its FY2011 revenues, nor can it be used as an accurate starting point for future adjustments to Emery's revenues.

The Public Interest Would be Served by Grant of this Waiver

In the *USF/ICC Order*, the Commission acknowledges the importance of ensuring that rate-of-return carriers have an opportunity to receive their Baseline Revenue because they are "generally smaller and less able to respond to changes in market conditions" and, therefore, a "reasonable transition" from the existing intercarrier compensation system is necessary.[8] The Commission claims that its overall reform "provides revenue certainty, stability, and predictable support, as well as promoting continued investment, consistent with advantages some historically have associated with rate-of-return regulation."[9] This is not the case, however, where the starting point for reform, the Baseline Revenue, is as inaccurate as Emery's. Rather, to achieve the Commission's stated objectives, in particular the objective of promoting continued investment, the Baseline Revenue must be accurate. The sole purpose of this waiver request is to ensure that the calculation of the Baseline Revenue is accurate.

By permitting Emery to include amounts associated with the corrected invoices in Base Period Revenues, the Commission would help assure the correct base amount is used in case further regulatory changes occur or there are unforeseen changes in Emery's network access traffic. Accordingly, grant of this waiver request is in the public interest.

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[8] *USF/ICC Order* at ¶891.
[9] *USF/ICC Order* at ¶902.

Additionally, it is not in the public interest to deny the grant of a waiver simply because Emery did not recover the intrastate access revenues in question as the result of the decision of a court or regulatory agency. As demonstrated, Emery did not discover the error in call rating and billing until the end of FY2011. After discovering the error, Emery promptly sent invoices for the unbilled traffic. Emery believed it would be able to justify the billed amounts to the interexchange carriers and recover the billed amounts through the normal process of invoice review and without litigation. Emery ultimately was able to do so, but not until after the March 31, 2012 deadline for a large percentage of traffic. It would be contrary to the public interest to require Emery to engage in litigation when it was not necessary.

Conclusion

Based on the foregoing, Emery respectfully requests that the Commission grant a waiver as requested herein.

Respectfully submitted,

Emery Telcom

/s/ Mary J. Sisak

Blooston, Mordkofsky, Dickens, Duffy &
Prendergast, LLP
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037
202-828-5554
mjs@bloostonlaw.com

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DECLARATION

I, Darren L. Woolsey, Chief Financial Officer of Emery Telcom, hereby declare under penalty of perjury that the facts and statements contained in the foregoing Emery Telcom Petition for Limited Waiver of 47 C.F.R. §51.917(c)(ii), are true and correct to the best of my knowledge, information and belief.

Darren L. Woolsey
10/26/2012